No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK, ET AL., PETITIONERS

v.

PALOMA GAOS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE CENTER FOR DEMOCRACY AND TECHNOLOGY, THE ELECTRONIC FRONTIER FOUNDATION, AND THE NATIONAL CONSUMERS LEAGUE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The Center for Democracy and Technology (CDT) is a non-profit public interest organization focused on protecting privacy and other civil liberties. For almost 25 years, CDT has represented the public's interest in an open, decentralized internet and worked to ensure that the constitutional and democratic values of free expression and privacy are protected in the digital age. CDT's team is comprised of experts with deep knowledge of issues pertaining to the internet, privacy, security, technology, and intellectual property, with backgrounds in academia, private enterprise, government, and nonprofits. This diversity of experience allows CDT to

[1] All parties have consented to the filing of this amicus curiae brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

translate complex policy into action: CDT convenes stakeholders across the policy spectrum, advocates before legislatures and regulatory agencies, and helps educate courts. CDT has regularly received *cy pres* awards that it has used to advance the public's privacy interests.

The Electronic Frontier Foundation (EFF) is a member-supported, non-profit organization that works to protect civil liberties and human rights in the digital world. Through impact litigation, direct advocacy, and technology development, EFF's team of attorneys, activists, and technologists encourage and challenge industry, government, and courts to support privacy, free speech, and innovation in the information society. Founded in 1990, EFF has nearly 40,000 dues-paying members. EFF regularly receives *cy pres* funding that has been used to advance the privacy interests of technology users.

The National Consumers League (NCL), founded in 1899, is the nation's oldest consumer organization. NCL has a long history of fighting for the public interest on a variety of issues. In support of its mission, NCL routinely advocates for privacy reform through petitions to federal agencies, promotion of consumer privacy legislation, and litigation. NCL is a vocal advocate for consumer privacy rights, and NCL's work in the privacy realm is aimed at ensuring that consumers are educated on their rights and encouraged to be vigilant in insisting that their personal privacy is protected. Through its website, NCL also provides updates on recent, verified data breaches, provides ongoing one-on-one fraud counseling through Fraud.org, and keeps consumers abreast of the latest scams and phishing tactics through their

monthly fraud alerts. NCL has received critically important *cy pres* awards that are used to further consumer rights and protections in privacy, data security, and consumer education.

SUMMARY OF THE ARGUMENT

In class action lawsuits, *cy pres* awards ensure that funds that would be impractical to distribute to individual class members are nevertheless used to benefit the class.[2] The policy behind the *cy pres* doctrine is to aggregate *de minimis* payments that otherwise would be economically or administratively infeasible to distribute to class members—particularly in the privacy context—into a charitable contribution that will ultimately have a much greater impact on all class members. The wide variety of organizations that receive *cy pres* awards—including CDT, EFF, and NCL—use these funds to pursue causes that directly benefit class members' interests related to the subject of the lawsuit. *Cy pres* awards constitute an important source of funding for these charitable organizations, and make possible many initiatives benefiting class members.

Cy pres awards are not—as petitioners claim—unfettered windfalls to recipients unrelated to the interests of the class. Rather, beneficiaries are chosen based on their demonstrated policy goals aligning with the interests of the class (such as, in the privacy context, preventing future privacy abuses), their prior accomplishments and charitable initiatives in the pertinent policy

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[2] "Cy pres" is a Norman French term that translates to "so close" or "as near as possible." *Nachshin* v. *AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011).

area, and detailed proposal submissions when requested by courts or counsel.

CDT, EFF, and NCL (collectively, "amici"), which regularly receive *cy pres* awards in privacy class actions, respectfully submit this brief to provide information about how appropriately designated *cy pres* recipients have used and will continue to use *cy pres* awards to provide tangible benefits to class members in privacy lawsuits. The Court should decline to impose restrictions on *cy pres* awards to organizations that further the interests of class members related to the claims at issue in the lawsuit, and the judgment of the court of appeals should be affirmed.

ARGUMENT

I. THE *CY PRES* DOCTRINE ENSURES THAT AWARDS BENEFIT CLASS MEMBERS BY AGGREGATING WHAT WOULD OTHERWISE BE COST-PROHIBITIVE *DE MINIMIS* INDIVIDUAL PAYMENTS

A. Class Action Awards Are Often Infeasible To Distribute Directly To Class Members—Particularly In The Privacy Context

The *cy pres* doctrine ensures that monetary awards in class actions actually benefit the class by aggregating what otherwise would be impractical *de minimis* payments to a small portion of the class into an award that ultimately provides greater impact for all class members.

Cy pres awards provide an efficient mechanism for courts to distribute funds for the benefit of the class when funds are difficult or costly to distribute. The *cy*

pres doctrine is often used when it is "economically or administratively infeasible to distribute funds to class members if, for example, the cost of distributing individually to all class members exceeds the amount to be distributed," or if individual awards would otherwise be *de minimis*. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 169 (3d Cir. 2013); see also *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34 (1st Cir. 2009) ("Distribution of all funds to the class can be infeasible, for example, * * * when class members' individual damages—although substantial in the aggregate—are too small to justify the expense of sending recovery to individuals."). One of the first courts to apply the *cy pres* doctrine to class actions recognized that *cy pres* could provide a creative solution to the problem of *de minimis* individual awards. *Miller* v. *Steinbach*, No. 66 Civ. 356, 1974 WL 350 (S.D.N.Y. Jan. 3, 1974) (in a shareholders' derivative suit, approving the payment of a settlement fund to a corporation's retirement plan rather than issuing a *de minimis* payment to shareholders).

Courts have applied the *cy pres* doctrine to address two challenges that are particularly salient in the privacy context: (1) the difficulty of monetizing the harm in class action lawsuits, and (2) the costs associated with identifying individual members of a large class. In the privacy context, it can be particularly difficult to attribute a definitive economic value to violations of consumers' privacy rights. See *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 639-640 (3d Cir. 2017) (describing damages for privacy torts as "a quintessential example" of when damages are difficult to measure (quoting *Pichler* v. *UNITE*, 542 F.3d 380, 399 (3d Cir. 2008))); Elizabeth J. Cabraser, *The Class Abides:*

Class Actions and the "Roberts Court," 48 Akron L. Rev. 757, 796 (2015) ("Where class members' privacy rights have allegedly been violated, the right to privacy may be priceless, but is difficult to monetize."). Class action lawsuits—particularly privacy lawsuits against large technology platforms—can involve defendants that have engaged in widespread misconduct that causes significant but difficult-to-measure economic damages to millions of individual class members, often resulting in *de minimis* settlement amounts for each class member despite the significant harm caused. See *Nachshin* v. *AOL, LLC*, 663 F.3d 1034, 1037 (9th Cir. 2011) (distribution of $2 million to approximately 66 million AOL subscribers would be "cost-prohibitive"). This problem of *de minimis* individual awards is exacerbated by the transaction costs associated with notifying a large number of individual class members and distributing their awards—costs that can easily exceed the amount to be distributed. See *In re Pharma. Industry*, 588 F.3d at 34; *Baby Prods.*, 708 F.3d at 169; Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. Cal. L. Rev. 97, 102-104 (2014). *Cy pres* awards address both of these problems by aggregating what would otherwise be impractical *de minimis* payments to a small portion of the class.

B. By Aggregating These Otherwise *De Minimis* Payments, *Cy Pres* Awards Create A Greater Positive Impact For All Class Members

The collective impact of a *cy pres* award creates greater value for class members than the *de minimis* individual awards distributed to class members. Both as a group and individually, class members often benefit

more from *cy pres* awards to organizations that further their interests than they would from receiving a *de minimis* payment of a small percentage of the award. Awarding funds to an organization that furthers the interests of the class also impacts *all* class members—not just the relatively few who would actually receive and cash their checks. Indeed, as petitioners (Br. 44-45) admit, their proposed distributions in this case would likely ultimately provide small payments to fewer than one percent of the class members.

Judge Posner articulated the value of the collective impact of a *cy pres* award in *Hughes* v. *Kore of Indiana Enterprise, Inc.*: "A foundation that receives $10,000 can use the money to do something to minimize violations of the [relevant statute]; as a practical matter, class members each given $3.57 cannot." 731 F.3d 672, 676 (7th Cir. 2013). Judge Posner found that "the award of damages to the class members would have no greater deterrent effect than the *cy pres* remedy, would do less for consumer protection than if the money is given to a consumer protection charity, and would impose a significant administrative expense that handing the $10,000 over to a single institution would avoid." *Id.* at 678.

Furthermore, *cy pres* awards benefit *all* class members—not just the small percentage of the class that would actually collect their *de minimis* distributions. Charitable organizations receiving *cy pres* awards can "more closely tailor the distribution to the interests of class members, including those absent members who have not received individual distributions." *Baby Prods.*, 708 F.3d at 172; see also *Hughes*, 731 F.3d at 676.

While *cy pres* benefits *all* class members, petitioners' proposed solutions—a lottery or claims-made system—would benefit an even smaller portion of the class than typically benefits in class actions. See Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a)* § 8.1 (Mar. 2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (finding an average claims rate of 21% and median of 8% in 105 consumer financial class action settlements requiring claims to be made). In petitioners' proposed systems, less than one percent of class members would actually receive funds—and even when limiting distribution to this sliver of the class, each claimant in a claims-made system would still receive only $7. See Pet. Br. 44-45. By contrast, *cy pres* awards to nonprofit organizations working in the space benefit the entire class by directing funds to support projects that further the interests at issue in the underlying litigation.

In addition to increasing the utility of the award and the number of class members who benefit, *cy pres* awards create an even greater deterrent effect than an award distributed to class members by (1) ensuring that unclaimed funds do not revert to the defendant, and (2) diverting funds to charitable organizations that are actively working to prevent the type of harm that led to the lawsuit. *Baby Prods.*, 708 F.3d at 172; *Hughes*, 731 F.3d at 676.

In sum, the policy behind *cy pres* awards is to create greater positive impact for all class members rather than merely giving small payouts to a fraction of the class—and, consistent with this policy, *cy pres* awards

do, in fact, make such an impact for class members in privacy actions.

II. Consistent With The Policy Behind The Doctrine, *Cy Pres* Awards Benefit Class Members In Privacy Actions

A. *Cy Pres* Recipients Regularly Engage In Advocacy Work That Benefits Class Members

Where direct awards are infeasible, well-structured and properly vetted *cy pres* awards have consistently provided an effective way to channel benefits that directly relate to the underlying lawsuit to the entire class—including absent class members. Organizations that receive *cy pres* awards, including amici, are engaged in meaningful advocacy on privacy issues benefiting class members such as those in this litigation.

Amici receive *cy pres* awards in cases involving significant privacy interests precisely because such interests are fully aligned with the organizations' policy goals and work. For example, amici received *cy pres* awards in settlements of cases involving claims that companies had unlawfully disclosed user information, implemented inadequate data security practices and misrepresented privacy practices to consumers, retained and disclosed the content viewing histories of consumers, and misappropriated the names and likenesses of users to promote products and services. See *In re Google Buzz Privacy Litig.*, No. 10-00672, 2011 WL 7460099 (N.D. Cal. June 2, 2011) (awards to CDT and EFF); *In re Ashley Madison Customer Data Sec. Breach Litig.*, No. 4:15-md-02669 (E.D. Mo. Nov. 20, 2017) (awards to EFF and NCL); *In re Netflix Privacy Litig.*, No. 5:11-cv-00379, 2013 WL

1120801 (N.D. Cal. Mar. 18, 2013) (awards to CDT and EFF); *Fraley* v. *Facebook, Inc.*, 966 F. Supp. 2d 939 (N.D. Cal. 2013) (awards to CDT and EFF), cert. denied, 137 S. Ct. 68 (2016).

Amici have used *cy pres* awards from such cases to advocate for consumers' privacy. While *cy pres* awards vary by year and these organizations do not budget for *cy pres*, *cy pres* funds made up approximately 23 percent of EFF's income in 2015 and 10 percent of EFF's income in 2016, 17 percent of CDT's revenue in 2017, and around 14 percent of NCL's income in 2017—in some years, accounting for nearly 80 percent of NCL's budget. See EFF, *2015 Annual Report* 32, https://www.eff.org/files/annual-report/2015/index.html; EFF, *2016 Annual Report* 45, https://www.eff.org/files/annual-report/2016/index.html; Financials, CDT.org, https://cdt.org/financials/. *Cy pres* funds provide critical support that enables these organizations to undertake consumer privacy-focused efforts that otherwise would not be possible.

For example, EFF has a dedicated team of technologists who build free software tools to help individuals protect their privacy online. See Tools from EFF's Tech Team, EFF.org, https://www.eff.org/pages/tools. EFF's "Privacy Badger" is a browser add-on that stops advertisers and other third-party trackers from secretly tracking where a user goes on the web. See Privacy Badger, EFF.org, https://www.eff.org/privacybadger. EFF's "HTTPS Everywhere" is a browser extension that encrypts communications with many major websites, making browsing more secure. See HTTPS Everywhere, EFF.org, https://www.eff.org/https-everywhere. EFF has also provided how-to guides to help users

adjust their privacy settings to better protect personal data on popular online platforms like Facebook, Twitter, and YouTube. See, *e.g.*, Gennie Gebhart, *How to Change Your Facebook Settings to Opt Out of Platform API Sharing*, EFF.org (Mar. 19, 2018).

NCL used *cy pres* funds it received from the AshleyMadison.com settlement to fund its Fraud.org and #DataInsecurity Project. See NCL, *The Consumer Data Insecurity Report: Examining the Data Breach—Identity Fraud Paradigm in Four Major Metropolitan Areas* (June 2014), http://www.nclnet.org/datainsecurity_report; Fraud.org, a project of the National Consumers League, www.fraud.org. Fraud.org educates consumers on actions to take in the aftermath of a data breach to protect themselves, includes a "latest breaches" section to keep consumers up to date on verified data breaches, and provides one-on-one fraud counseling. NCL also works to keep consumers abreast of the latest scams and phishing tactics through its monthly fraud alerts. In related work, CDT builds tools like online quizzes designed to educate consumers about how to protect their privacy rights. See, *e.g.*, CDT Quiz, Online Security While Traveling, https://cdt.org/bits/cdt-quiz-online-security-while-traveling/.

Amici have also advocated for stronger consumer privacy protections before administrative bodies. For example, in 2016, amici all submitted comments urging the Federal Communications Commission (FCC) to adopt a broad view of the types of data protected by its consumer privacy rules, helping to shape the FCC's technical understanding of how internet service providers access customer information. Comments of the Center for Democracy and Technology, *In re Protecting the*

Privacy of Customers of Broadband & Other Telecomm. (F.T.C. May 27, 2016) (No. 16-106), https://ecfsapi.fcc.gov/file/60002079430.pdf; Comments of the Electronic Frontier Foundation, *In re Protecting the Privacy of Customers of Broadband & Other Telecomm.* (F.T.C. May 27, 2016) (No. 16-106), https://ecfsapi.fcc.gov/file/60002081036.pdf; Comments of the National Consumers League, *In re Protecting the Privacy of Customers of Broadband & Other Telecomm.* (May 27, 2016) (No. 16-106), https://ecfsapi.fcc.gov/file/60002078689.pdf. As another example, in 2015, CDT provided comments to the National Telecommunications and Information Administration advocating for the adoption of Fair Information Practice Principles to limit the collection, analysis, and retention of data gathered by Unmanned Aircraft Systems (*i.e.*, drones) in order to protect individuals' privacy. CDT Comments to NTIA on "Privacy, Transparency, and Accountability Regarding Commercial and Private Use of Unmanned Aircraft Systems" (Apr. 20, 2015), https://www.ntia.doc.gov/files/ntia/cdt_04202015.pdf.

Amici also advocate for consumer privacy in the context of regulatory enforcement. For example, in 2017, CDT submitted a complaint to the Federal Trade Commission (FTC) alleging that the data handling practices of a virtual private network (VPN) provider conflicted with statements the provider had made to consumers. Complaint, *In the Matter of AnchorFree, Inc. Hotspot Shield VPN* (F.T.C. Aug. 7, 2017). Following up on this work, in February 2018, CDT announced a new initiative to create best practices and guidelines for protecting user information transmitted through VPNs. Joseph Jerome, *CDT Launching Effort to Improve Trust in*

VPNs, CDT.org (Feb. 14, 2018). EFF has also submitted comments to the FTC, for example, expressing consumer privacy and security concerns arising from Vehicle-to-Vehicle communications systems. See Comments of EFF to the FTC and NHTSA on Connected Cars Workshop and P175403 (May 1, 2017), https://www.ftc.gov/system/files/documents/public_comments/2017/05/00044-140639.pdf. Similarly, NCL submitted comments to the FTC earlier this year regarding consumer protection issues in communication, information, and media technology networks. Comments of the NCL to the FTC regarding Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201 (Aug. 20, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0049-d-1664-155200.pdf.

Amici also regularly advocate for consumers' privacy interests before legislative bodies. As early as two decades ago, CDT urged the adoption of a national privacy policy that would help protect the privacy of consumers online. *Children's Online Privacy Protection Act of 1998: Hearing on S. 2326 Before the S. Subcomm. on Communications*, 105th Cong., 2d Sess. (1998) (testimony of Deirdre Mulligan, Staff Counsel, CDT). More recently, CDT has urged the Senate to update existing laws and enact stronger protections for data (such as location data) on mobile devices. *Protecting Mobile Privacy: Your Smartphones, Tablets, Cell Phones and Your Privacy: Hearing before the Subcommittee on Privacy, Tech. and the Law*, 112th Cong., 1st Sess. 23 (2011) (statement of Justin Brookman, Director, Project on Consumer Privacy, CDT). CDT has also testified before Senate committees regarding the need for strong data

privacy and security for Internet-of-Things devices, and regarding the importance of Do-Not-Track standards that can limit or control consumers' exposure to online behavioral advertising. *The Connected World: Examining the Internet of Things: Hearing before the Comm. on Commerce, Sci., & Transp.*, 114th Cong., 1st Sess. 116 (2015) (statement of Justin Brookman, Director, Project on Consumer Privacy, CDT); *A Status Update on the Development of Voluntary Do-Not-Track Standards: Hearing before the Comm. on Commerce, Sci., & Transp.*, 113th Cong., 1st Sess. 24 (2013) (statement of Justin Brookman, Director, Consumer Privacy, CDT). Similarly, in 2014, NCL testified before a Senate subcommittee, urging passage of a bill that would provide stronger protections for consumers' location data. *The Location Privacy Protection Act of 2014: Hearing Before the Subcommittee on Privacy, Tech., and the Law*, 113 Cong., 2d Sess. 21 (2014) (statement of Sally Greenberg, Executive Director, NCL).

EFF has also been involved in debates over consumer privacy and security in Congress and has worked to educate lawmakers and their staff on consumer privacy issues. For example, earlier this year EFF held a briefing in the Capitol on the technical realities of device encryption, privacy, and security. Andrew Crocker & Nate Cardozo, *Bring in the Nerds: EFF Introduces Actual Encryption Experts to U.S. Senate Staff*, EFF.org (May 3, 2018). EFF also joined many other consumer groups in criticizing major privacy legislation in Congress in 2011. Rainey Reitman, *Well-Meaning 'Privacy Bill of Rights' Wouldn't Stop Online Tracking*, EFF.org (Apr. 14, 2011).

EFF—which is based in San Francisco—is also an active advocate of consumer privacy issues at the state level, and has pursued strong consumer privacy protections before the California legislature. See, *e.g.*, Susan Freiwald, *At the Privacy Vanguard: California's Electronic Communications Privacy Act (CalECPA)*, 33 Berkeley Tech. LJ. 137, 139, 150 (2018) (describing EFF's role as a co-sponsor of the CalECPA, "the most privacy-protective legislation of its kind in the nation"); Letter from Amul Kalia, Analyst, EFF to Sen. Jerry Hill (Mar. 30, 2018), https://www.eff.org/files/2018/04/24/sb_823_supportletter_final_.pdf (encouraging passage of S.B. 823, which allows Californians to place and remove credit freezes at no charge).

CDT regularly authors white-papers promoting consumer privacy, which benefit class members in privacy lawsuits by advocating for stronger privacy rights and providing guidance to policy makers and other stakeholders. In one such white-paper, for example, CDT detailed the ways in which current legal frameworks are insufficient to protect privacy in the workplace, and made suggestions for mitigating workplace privacy risks. Ali Lange et al., *Workplace Privacy: State Legislation & Future Technology Questions*, CDT.org (June 1, 2016), https://cdt.org/files/2016/06/CDTWorkplacePrivacyWhitePaper-Final.pdf. In another white-paper, CDT advocated for updating federal privacy laws and for enacting regulations regarding the data use and sharing practices of educational technology providers. CDT, *Privacy and the Digital Student* (May 2015), https://cdt.org/files/2015/06/Student-Privacy-White-Paper-v.-9_1.pdf.

EFF has also actively advocated for strong student privacy protections and greater awareness by educators about how private companies collect and use student data. EFF submitted a complaint to the FTC regarding the practices of Google's online education services, and submitted comments to the FTC regarding the privacy implication of educational technology. See Complaint and Request for Investigation, Injunction, and Other Relief, *Electronic Frontier Found.* v. *Google, Inc.* (F.T.C. Dec. 1, 2015); Letter from Nate Cardozo, Sophia Cope, Staff Attorneys, EFF to the FTC (Nov. 17, 2017), https://www.ftc.gov/system/files/documents/public_comments/2017/11/00034-141966.pdf.

Amici also regularly file briefs arguing for strong privacy protections for individuals, often in conjunction with other privacy advocates. For example, amici have filed a number of briefs before this Court advocating for individual privacy. See, *e.g.*, CDT Amicus Br., *Carpenter* v. *United States*, 138 S. Ct. 2206 (2017) (No. 16-402) (arguing that warrants should be required to search cell phones for location data); CDT Amici Br., *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2015) (No. 13-1339) (arguing in favor of a private right of action under the Fair Credit Reporting Act so consumers can seek redress when harmed); CDT Amici Br., *Riley* v. *California*, 2014 WL 950808 (2014) (Nos. 13-132, 13-212) (arguing for a narrow application of the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement); CDT Amici Br., *United States* v. *Jones*, 565 U.S. 400 (2011) (No. 10-1259) (highlighting the differences between GPS-based surveillance and standard techniques, in support of stronger privacy protections).

With their consistent advocacy for stringent protections for individuals' privacy, amici have pursued interests closely aligned with those of the class members in the cases in which they have received *cy pres* awards. *E.g.*, *Ashley Madison*, No. 4:15-md-02669 (settlement of claims regarding inadequate security measures and misrepresentation of privacy practices); *Google Buzz Privacy Litig.*, 2011 WL 7460099 (settlement of claims regarding allegedly unlawful disclosure of consumers' personal information); see also pp. 9-10, *supra* (summarizing cases in which amici have received *cy pres* awards). Many of amici's privacy initiatives are made possible by *cy pres* awards, which fund projects both directly and indirectly as significant portions of amici's operating budgets. See p. 10, *supra*. These examples illustrate not only the benefits that privacy organizations provide to consumers, but also the alignment between the specific interests of class members and the work of these organizations.

B. *Cy Pres* Awards Further The Interests Of The Class, Not The Defendant

Petitioners, and certain amicus briefs supporting petitioners, contend that *cy pres* awards benefit class action defendants instead of class members, allowing defendants to exert influence over their selected recipients. These claims are unfounded and demonstrate a misunderstanding of how these advocacy organizations operate.

1. Courts Can Ensure that *Cy Pres* Awards Promote the Interests of the Class

First, *cy pres* awards are often limited by statute or case law to ensure that they actually further the interests of the class. While petitioners (Br. 28) contend that *cy pres* awards are "prone to abuse" and used to promote the interests of defendants or counsel rather than the class, courts can and have implemented measures to ensure that *cy pres* awards benefit class members. For example, in the Ninth Circuit, *cy pres* award recipients must have a close nexus to the nature of the lawsuit and the interests of the silent class members. See *Dennis* v. *Kellogg Co.*, 697 F.3d 858, 865 (2012) (requiring that *cy pres* awards be "guided by (1) the objectives of the underlying statute(s) and (2) the interests of the silent class members, and must not benefit a group too remote from the plaintiff class" (citation omitted)); see also *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 33-34 (1st Cir.) (*cy pres* distributions should "reasonably approximate the interests of the class members," and collecting cases), cert. denied, 568 U.S. 932 (2012). Courts can and do police failures to comport with these requirements. See, *e.g.*, *Nachshin*, 663 F.3d at 1040-1041 (remanding for selection of appropriate charities where none of the original *cy pres* recipients had "anything to do" with the underlying claims). Further, *cy pres* awards may be predicated on the submission of detailed proposals, and *cy pres* recipients may be required to agree to conditions that ensure that a *cy pres* award will be used to benefit the class. See, *e.g.*, *Netflix Privacy Litig.*, 2013 WL 1120801, at *2 (describing how *cy pres* funds are to be distributed to organizations for certain purposes, and noting that the parties "have selected

twenty such organizations which will 'spend the funds solely on privacy protection and education efforts'" (citation omitted)); *In re Lupron Mktg. & Sales Practices Litig.*, 729 F. Supp. 2d 492, 494-497 (D. Mass. 2010) (awarding *cy pres* funds to a recipient after considering two competing proposals for the use of the funds). Indeed, such an approach was taken in this case. As the Ninth Circuit recognized, the district court in this case carefully reviewed the recipients' "detailed proposals."[3] Pet. App. 16.

2. Defendants Have No Control over Projects Supported by *Cy Pres* Awards

The mere existence of a relationship between a defendant or class counsel and a *cy pres* recipient does not render a *cy pres* award inappropriate, or undermine the award's benefits for class members. Although amici have received *cy pres* funds from defendants that have also voluntarily donated to these organizations, amici do not receive these awards because of a relationship with defendants. Rather, these awards result from a court finding alignment between the privacy interests at issue in a case and the work of the recipient organization. In fact, independent of any relationships between amici and the defendants, amici have often been suggested as *cy pres* recipients by *plaintiff's* counsel, who recognize that amici are effective leaders in the public policy areas of privacy and consumer protection. Similarly, the existence of a relationship between defense counsel and a *cy pres* recipient does not suggest an attempt to self-deal or steer contributions. Counsel practicing in an area of

[3] For the full text of each proposal, see Class Respondents App. 9a-223a.

law related to the work of these charitable organizations—especially in an emerging area of law like online privacy—may be limited in number.

Furthermore, the mere fact that a *cy pres* recipient shares certain viewpoints with a settling defendant does not undermine a *cy pres* award's benefit to class members. The Lowery amici's claim (Br. 9) that "the Berkman Center, the Center for Democracy and Technology, and Stanford's Center for Internet and Society are also consistent opponents of artists' rights and supporters of Google's interests," ignores the fact that, in the vast realm of internet-related advocacy, consumer-oriented organizations can align with large technology firms in some areas, such as protecting free expression and an open internet, and diverge from those firms in other areas, such as on some privacy issues.[4]

Donations to amici are also subject to gift acceptance policies that prohibit influence or control over the organizations' projects and priorities. See CDT, *Gift Acceptance Policies* (June 2016), https://cdt.org/files/2016/07/CDT-Gift-Acceptance-Policies.pdf. Companies like Google have donated to amici even during years in which amici have publicly criticized their practices. Moreover, none of this is done in secret. Amici accept funds from a variety of sources and are transparent

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[4] Although the Lowery amici argue that their interests are somehow harmed by the court's *cy pres* award as a result of the *cy pres* recipients' work ensuring that copyright does not undermine free expression, the Lowery amici do in fact benefit from the *cy pres* recipients' work in the privacy space—which is the subject of this lawsuit.

about funding. All amici release their financials and annual audits on their websites. See Financials, CDT.org, https://cdt.org/financials/; Financials, NCL.net http://www.nclnet.org/financials; Annual Reports & Financial Information, EFF.org, https://www.eff.org/about/annual-reports-and-financials.[5]

Further demonstrating the independence of *cy pres* recipients from class action defendants, recipients of *cy pres* awards have not hesitated to oppose the practices of defendants from which they have received *cy pres* awards—in the press, in the courts, and before administrative bodies. For example, as mentioned on p. 16, *supra*, EFF filed a complaint with the FTC alleging that Google's "Google for Education" online service violated Google's commitments in the Student Privacy Pledge and Google's representations about its handling of student data. Complaint, *Electronic Frontier Found.*, *supra*. Recently, EFF criticized Google's "Confidential Mode" feature in Gmail, alleging that its name was misleading and claiming that there were privacy and security risks associated with Gmail. Gennie Gebhart & Cory

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[5] CDT raises its annual operating funds from a variety of sources, most notably foundations, corporations, individuals, and *cy pres* awards. All of CDT and NCL's donors over $1,000 are publicly disclosed on their websites. Financials, CDT.org, https://cdt.org/financials/; NCL, *2017 Annual Report*, http://www.nclnet.org/annual_report.

Furthermore, in 2016, EFF received over half of its annual income from individual donors, with the rest coming from a variety of sources including foundations, companies, and *cy pres*. In 2018, EFF has approximately 40,000 members who pay regular dues. See EFF, *2016 Annual Report*, https://www.eff.org/files/annual-report/2016/index.html.

Doctorow, *Between You, Me, and Google: Problems with Gmail's "Confidential Mode,"* EFF.org (July 20, 2018).

As another example, in 2009, both CDT and EFF challenged Google's proposed settlement in *Authors Guild* v. *Google*, a copyright class action, on the grounds that the settlement would inadequately protect the privacy rights of readers of digital books. See 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (denying final approval of the settlement agreement). CDT filed an amicus brief in that case, raising its concerns that the settlement agreement gave Google "a massive centralized repository * * * of information about how people access and read books online" without including adequate privacy commitments from Google regarding its handling of such data. CDT Amicus Br., *Authors Guild*, *supra* (No. 05-8136). CDT urged the district court to include in any approval of the settlement court-ordered mandates requiring Google to protect the privacy of readers. *Ibid.* In the same case, EFF served as counsel to objecting privacy authors and publishers within the class, who urged the district court to deny approval of the settlement agreement because it "include[d] no limitations on collection and use of reader information and no privacy standards for retention, modification, deletion or disclosure of that information to third parties or the government." Privacy Authors and Publishers' Objection to Proposed Settlement, *Authors Guild*, *supra* (No. 05-8136).

As these examples demonstrate, *cy pres* is not a *quid pro quo* between settling defendants and charitable organizations. These organizations' projects and positions are based solely on their own policies and views, regardless of the viewpoints of donors—or defendants from whom they receive *cy pres* awards. *Cy*

pres recipients are not chosen for the benefit of defendants, but rather are selected based on their core values, track records of successful advocacy, and ability to use *cy pres* funds to positively impact members of the class.

CONCLUSION

The Court should decline to impose restrictions on *cy pres* awards to organizations that further the interests of class members related to the claims at issue in the lawsuit. The categorical remedy petitioners seek would undermine the important work of organizations receiving awards in furthering consumers' privacy interests, instead mandating impractical or infeasible distributions of *de minimis* sums to class members who would actually benefit more by the application of the *cy pres* doctrine. For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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